Nos. 10,547-10,548

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

WILLIAM R. WALLACE, JR.,
Petitioner,
vs.
COMMISSIONER OF INTERNAL REVENUE,
Respondent.

INA CLAIRE WALLACE,
Petitioner,
vs.
COMMISSIONER OF INTERNAL REVENUE,
Respondent.

(CONSOLIDATED CASES)

BRIEF OF PETITIONERS ON REVIEW.

W. R. WALLACE, JR.,
310 Sansome Street, San Francisco,
Attorney for Petitioner,
Ina Claire Wallace.

W. R. RAY,
310 Sansome Street, San Francisco,
Attorney for Petitioner,
W. R. Wallace, Jr.

WILLIAMSON & WALLACE,
310 Sansome Street, San Francisco,
Of Counsel.

Subject Index

Table of Authorities Cited

Cases

Statutes

Text Books

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William R. Wallace, Jr., *Petitioner,* vs. Commissioner of Internal Revenue, *Respondent.*	(Consolidated Cases)
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JURISDICTION.

The taxpayers' petition for review herein involves the deficiency in individual income taxes for the taxable year 1939 in the amount of $558.41 in respect of petitioner William R. Wallace, Jr. (R. p. 32) and in the amount of $503.41 in respect of petitioner Ina Claire Wallace (R. p. 33) and is taken from decisions of the Tax Court of the United States entered May 7, 1943. (R. pp. 32-33.) The case is brought to this Court by petitions for review filed August 4, 1943 (R.

pp. 34, 36), pursuant to the provisions of Sections 1141 and 1142 of the Internal Revenue Code.

OPINION BELOW.

The only previous opinion in this case is the memorandum opinion of the Tax Court of the United States (R. pp. 25-32) which is not recorded.

STATUTES AND REGULATIONS INVOLVED.

The pertinent statute is Section 23 (a) (1) of the Internal Revenue Code and Article 23 (a) (1) of Treasury Regulations 101.

QUESTION PRESENTED.

The question presented by the petitions for review is whether petitioners, or either of them, are entitled to deduct from income for the year 1939 living expenses incurred away from their home in San Francisco, and which they deducted, one-half each, in their returns filed for 1939.

STATEMENT OF THE CASE.

This case arises on petitions to review decisions of the Tax Court of the United States entered on May 7, 1943 determining a deficiency in income tax for the year 1939 against petitioner William R. Wallace, Jr., in the amount of $558.41 and against petitioner Ina Claire Wallace in the amount of $503.41. The

question presented by the petition for review is whether the petitioners, or either thereof, are entitled to deduct as ordinary and necessary business expenses for the calendar year 1939 certain living expenses incurred by the petitioners in Los Angeles, California, and one-half of which expenses were deducted by each of the petitioners.

The applicable Federal Taxing Statute is Section 23 (a) of the Internal Revenue Code, which reads as follows:

> "SEC. 23. DEDUCTIONS FROM GROSS INCOME.
>
> In computing net income there shall be allowed as deductions:
>
> (a) Expenses.—
>
> (1) In General.—All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including a reasonable allowance for salaries or other compensation for personal services actually rendered; traveling expenses (including the entire amount expended for meals and lodging) while away from home in the pursuit of a trade or business; and rentals or other payments required to be made as a condition to the continued use or possession, for purposes of the trade or business, of property to which the taxpayer has not taken or is not taking title or in which he has no equity."

Petitioners are husband and wife and were married on March 16, 1939. (R. p. 80.) Petitioner Ina Claire Wallace is a well known actress and petitioner William R. Wallace, Jr. is a lawyer and has resided and practiced law in San Francisco since 1927. (R. p. 79.)

Upon their marriage, the petitioners agreed to maintain their home and residence in San Francisco and have done so since the date of their marriage. (R. p. 122.) Prior to her marriage, petitioner Ina Claire Wallace was a resident of New York. During the year 1939, petitioner Ina Claire Wallace was engaged in the making of motion pictures for approximately two weeks during the month of January and for approximately three months during the months of May, June, July and August. As compensation for these services she was paid a sum equal to her normal theatrical season's earnings, which sum was paid at the rate of $2000 per week for 34 weeks out of the total forty weeks elapsing from January 1 to September 15, 1939. Under the terms of her agreement with the motion picture company she agreed to be available during the 40-week period and to make other pictures for the company if they met with her approval. Several other pictures were offered to her, but were not made by her as she refused to accept them. During the year 1939, she resided in San Francisco for some weeks prior to her marriage on March 16th and did not return to Los Angeles until about May 1st. She then remained in and about Los Angeles except for a few weeks in San Francisco until September 15, 1939, at which time she returned to her home and residence in San Francisco and remained there during the balance of the year. She was therefore in Los Angeles approximately 6 months of the calendar year. (R. pp. 106, 110, 113.)

During the period of time spent in San Francisco after their marriage, both petitioners reviewed a

great many plays which various authors and producers had submitted for approval. Mrs. Wallace appeared in one of such plays in New England for two or three months in the summer of 1940 and in the fall of that year began rehearsals for another play so chosen and which opened on the "road" in January 1941. The play continued on the "road" and in New York until about the middle of April when petitioner returned to her home in San Francisco. (R. p. 123.)

Petitioners during 1939 and since that date have both been outside of the State of California on business, sometimes together and sometimes separately. (R. p. 125.)

The petitioners filed separate income tax returns for the year 1939. (R. p. 15.)

Each petitioner returned one-half of the community income and took credit for one-half of the community expenses. (R. pp. 15 and 16.)

One-half of each of the ordinary and necessary expenses paid by each of the petitioners while away from home in the pursuit of their business were charged as expenses on each return. (See Ina Claire Wallace Income Tax Return, R. p. 93.)

The traveling and living expenses of petitioner William R. Wallace, Jr., while away from home were not challenged—the only question being the propriety of the deduction of petitioner Ina Claire Wallace's expenses. (R. p. 112.)

The Commissioner of Internal Revenue and the Tax Court of the United States disallowed the ex-

penses upon the theory that the petitioner Ina Claire Wallace had, of necessity, established a "home" in Los Angeles during the period of her employment there, and, therefore, that the expenses were not "ordinary and necessary business expenses incurred while away from home in the pursuit of a trade or business", and upon the further ground that the question was in the opinion of the Court not in any manner affected by the laws of the State of California. (Opinion of Tax Court, R. p. 31.)

SPECIFICATION OF ERRORS.

1. The Tax Court of the United States erred in its construction of Sec. 23 (a) (1) of the Internal Revenue Code.

2. The Tax Court of the United States erred in its determination that the petitioner Ina Claire Wallace established a "home" in the City of Los Angeles during the calendar year 1939.

3. The Tax Court of the United States erred in its determination that the "home" and place of business of petitioners was not affected by the community property and domiciliary laws of the State of California.

4. The Tax Court of the United States erred in its decision that the taxpayer petitioners were not entitled to the deductions claimed upon their respective income tax returns for the year 1939 and were liable for deficiencies in income tax for that year.

SUMMARY OF ARGUMENT.

In its memorandum opinion, the Tax Court of the United States admits that San Francisco was the domicile and legal residence of both petitioners. (R. p. 31.) The Tax Court makes no suggestion that San Francisco was not the "home" of both petitioners as that word is usually understood. The Tax Court, however, states that it has construed the word "home" as used in Section 23 (a) to mean "the taxpayer's place of business, employment or post or station at which he is employed", and, basing its decision upon that construction of the meaning of the word "home", the Court then concludes that a taxpayer may not have a "home" except at his place of business or employment or the post or station at which he is employed. (R. pp. 29, 30.)

We will first discuss the fundamental question of whether the statute is under any circumstances capable of the construction placed upon it by the Tax Court and then discuss each of the rules laid down by the Tax Court with respect to the construction of the statute, and, finally, the question as it is affected by the laws of the State of California.

ARGUMENT.

1. THE INTENT OF THE CONGRESS IN ITS USE OF THE WORDS "AWAY FROM HOME IN THE PURSUIT OF A TRADE OR BUSINESS".

> "While the meaning to be given a word used in a Statute will be determined from the character

> of its use, words in common use are to be given their natural, plain, ordinary and commonly understood meaning, in the absence of any statutory or well established technical meaning, unless it is plain from the statute that a different meaning was intended or unless such construction would defeat the manifest intention of the legislature. The words are to be interpreted with due regard to the subject matter of the statute and its purpose, and it may be necessary, in order to give effect to the legislative intent, to extend or restrict the ordinary and usual meaning of words; but the words of a statute are not to be given a forced, strained or subtle meaning."
>
> 59 *Corpus Juris* 974, Section 577.

There is nothing in the statute itself to indicate that the Congress in passing the legislation of which Section 23 (a) is a part intended any other meaning for the word "home" than the common and ordinarily accepted meaning of that word. That meaning was well expressed by the Court of Appeals of Maryland in the following language:

> "His home is the place where he and his family habitually dwell, which they leave for temporary purposes and to which they return when the occasion for absence no longer exists."
>
> *Thompson v. Warner,* 83 Md. 14, 34 Atl. 830 at page 831.

The same belief was expressed in somewhat more florid language by the Supreme Court of North Dakota in its headnote to the case of *O'Hare v. Bismarck Bank,* 45 N. D. 641, 178 N. W. 1017:

> "The 'home' or 'residence' of a person is the place where he commonly resides; a place to which when absent, he returns, like a bee to its hive, a carrier pigeon to its home, and a bird to its nest."

In a note prepared by Professor Erwin N. Griswold, of the Harvard Law School and reported at Vol. LVI, No. 7 of the Harvard Law Review for June, 1943 (and which note is printed in full in the Appendix to this brief), the learned author states:

> "The statute allows the deduction of 'All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business * * *'. This language has been unchanged since the Revenue Act of 1918. Apparently it finds its origin in provisions which were included in the Act of August 27, 1894. The legislative history of those provisions gives clear evidence that they were intended to have broad application; and no action of Congress since that time has ever indicated a contrary intention."

It seems apparent that had Congress intended that the word "home" should not be used in its ordinary sense, but should mean "place of business", Congress would have used the words "place of business" and not the word "home". Likewise if Congress had intended to provide that a person could not have a "home" at a place where he was not at that moment engaged in business, Congress would have so provided.

The Tax Court, by first construing the word "home" to mean "place of business" and by then taking the next step and concluding that Congress

did not intend to permit a man to have a "home" except where he was at that moment engaged in business has clearly destroyed the congressional mandate. It seems clear that under the construction placed upon the section by the Tax Court, no taxpayer could ever be away from his "home" on business because the place at which he is doing business and his home must be the same.

The Tax Court has, by its construction, reduced the language of Congress to an absurdity.

In its memorandum opinion, the Tax Court of the United States remarks (R. p. 31) that Mrs. Wallace was "free to make her home there (in the vicinity of Hollywood) for the duration of her employment, as we think she did". The statement that petitioner was free to make her home in Los Angeles is not true, as under the California statutes, it is the husband, not the wife, who chooses the family home and determines where it shall be. The opinion itself in the very next paragraph admits that both petitioners agreed that their domicile and residence was San Francisco and that at all times San Francisco was the "home" of both petitioners as that word is commonly used.

The word "home" is certainly in common use and has a "natural, plain, ordinary and commonly understood meaning".

To say that "home means place of business, employment, or the post or station at which he is employed" and then to follow that construction with the further qualification that a taxpayer may not keep his home or residence at a place where he is not

at that moment engaged in business is certainly to give a common word a "forced, strained and subtle meaning".

The legislative history of the provisions shows they were intended to have such broad application; the Tax Court gives them the narrowest possible meaning.

We submit that the language of the statute is plain and needs no "construction" and that the Tax Court of the United States erred in giving to the word "a forced, strained or subtle meaning" destructive of the congressional intent.

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2. THE PETITIONER INA CLAIRE WALLACE HAS A PLACE OF BUSINESS AT HER HOME AND RESIDENCE IN SAN FRANCISCO.

In its memorandum opinion, the Tax Court proceeds upon the assumption, which we believe to be false, that an actor is only conducting business during that period when he or she is actually on the stage or making a motion picture. The record before us shows that both petitioners read and studied a great many plays at their residence in San Francisco during the calendar year 1939. (R. p. 27.) The record also shows that various motion pictures were offered to petitioner Ina Claire Wallace during the year 1939; that both petitioners discussed the advisability of appearing in those pictures, decided against appearing in them, and those decisions were made in San Francisco. The record also shows that the office in San Francisco was the place of business at which tele-

grams, telephone calls and mail were received during the year 1939 in respect of the petitioner Ina Claire Wallace's business as an actress. (R. pp. 82, 83, 108.)

We think the record supports the well known fact that a great deal of the time given by an actor or actress to his "business" is taken up in the reading of plays in an endeavor to find a suitable role; in discussions with the authors of those plays in an attempt to get the author to modify the play to suit the actor or actress; in the study of the role after the play has been chosen; in the determination of publicity; the acquisition of the necessary wardrobes; and the many acts and functions which finally germinate in the finished production as it appears either on the stage or on the screen. Those functions are all conducted in the actor's home and not at some spot chosen, after the event, by the Tax Court. The functions of an actor or actress are not unlike those of a lawyer. No member of any Court would suggest that a lawyer was only in business during the time he was appearing before the Court. No Court would suggest that because the petitioner, William R. Wallace, Jr., occasionally travels to other jurisdictions to try lawsuits, he establishes a new home in every community in which he tries a lawsuit. The only difference between the two professions is that the lawyer normally maintains an office in the same town as his home. The actor has his "office" at his home and performs the functions which correspond to those performed by a lawyer at his office at his home.

We now come to a discussion of the two lines of authority promulgated by the tax Court of the United

States in construing the meaning of the word "home" as used in Section 23 (a) of the Internal Revenue Code.

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3. THE CHESTER D. GRIESEMER RULE.

In *Chester D. Griesemer,* 10 B.T.A. 386, the taxpayer, who was engaged in business in New York, maintained a home in Brooklyn where he supported his mother and sister. He was sent to Paris on business for his firm and such business required his staying in Paris for three years. The Board allows his Paris living expenses as a deduction, saying:

> "We are convinced that the terms 'personal, living or family expenses' referred to in section 215, supra, were intended by the Congress to be applied in the ordinarily accepted sense of those words and not in the broad and sweeping sense in which the respondent is seeking to apply them. Simply because the amounts in question happen to be 'living' expenses in a strict sense does not prevent them from being deductible if they are ordinary and necessary and are shown to have been incurred in carrying on his trade or business and are clearly in addition to his living expenses at the usual place of abode which he maintains for his mother and sister. The Congress undoubtedly intended that the taxpayer's personal expenditures in maintaining his usual place of abode should not be deducted, but that all expenditures made by the taxpayer in addition to those amounts if incurred in carrying on a trade or business should be deducted in determining net income."

In *Walter F. Brown,* 13 B.T.A. 832, the *Griesemer* rule was broadened to hold that where Mr. Brown accepted a governmental appointment which required his presence and work in Washington about half the time but retained his home and professional connection in Toledo, Ohio, Mr. Brown's expenses of traveling to and from Washington and of his meals and lodging while there were deductible ordinary and necessary expenses in pursuit of his trade or business.

Following the rule so established the Board of Tax Appeals and the Commissioner of Internal Revenue have held that the following actions constituted the pursuit of a trade or business, and that therefore traveling and living expenses expended therefor were deductible:

1. The tutoring by a college professor in a city other than the city in which he maintained his home. I.T. 2481, VIII-2, C.B., p. 291 (1929).

2. The teaching by a professor at a summer school or a university other than the university regularly employing him. G.C.M. 10915, XI-2 C.B., p. 245 (1932).

3. The attendance by a member of a state legislature at the meetings thereof at a city other than his home. I.T. 3368-1940-1 C.B. 29 (1940).

4. The playing in golf tournaments by a professional golfer. G.C.M. 7133, VIII-2 C.B . 85 (1929).

5. The living in a distant city by a real estate operator for the purpose of managing and salvaging an investment. *Fred Dennett,* 7 B.T.A. 1174 (1927).

6. The traveling from Florida to California to safeguard an investment in a hotel constituting taxpayer's main source of income. *Elmore L. Potter,* 18 B.T.A. 549 (1929).

7. The living in New York for three days a week by a Boston business man in connection with corporations which he managed. *Joseph W. Powell,* 34 B.T.A. 655 (1936).

8. The living in Washington during a portion of each week by an employee of Moody's in New York, who was also employed by the S.E.C. *Donald B. McCruden,* B.T.A. Memo, Docket No. 87,806.

In G.C.M. 7133, VIII-2 C.B. 85, the General Counsel of the Bureau of Internal Revenue had this question before him in determining the right of a professional golfer to deduct his living expenses while he was away from "home". The General Counsel ruled that:

> "Bouvier's Law Dictionary (Rawles Third Revision) defines business as 'that which occupies the time, attention, and labor of men for the purpose of livelihood or profit, but it is not necessary that it should be the sole occupation or employment. It embraces everything about which the person can be employed.' This definition has been followed with approval by the Supreme Court in the case of *Flint v. Stone Tracy Co.* (220 U.S. 107), the opinion noting also that 'business is a very comprehensive term and embraces everything about which a person can be employed.' * * *
>
> The occupation of professional golf playing does not necessarily confine the player to a golf

club where he may be employed as instructor, but permits him to engage in his occupation at other places where he may receive some compensation for his activities as a golf player. In giving public exhibitions of golf playing for a consideration, and in competing at professional golf tournaments for a prize, or for money, the professional golf player is merely pursuing his occupation in another place. In many instances professional golf players are not attached as instructors or experts to any particular golf club, but gain a livelihood solely by competition in tournaments or by giving exhibitions of skillful golf playing.

Since professional golf playing constitutes a trade or business, it comes within the scope of section 23 (a) of the Revenue Act of 1928.

In Solicitor's Memorandum, 1048 (C.B. 1, 101), it was held that 'the test, therefore, is whether an expense is incurred primarily because of the business as the immediate cause inducing the expenditure'. Applying this test to the instant case, it is clear that the immediate cause of an expenditure would be the business of professional golf playing in different localities which offer inducements to the golf player to exercise his skill. * * *

Accordingly, a professional golf player traveling from his home to other places for the purpose of giving for compensation, exhibitions of golf playing or of competing in professional golf tournaments for prizes or other consideration, is entitled to deduct his ordinary and necessary traveling expenses paid or incurred while away from home in pursuit of such business. It follows that the entire amount expended for railroad fare and for meals and lodging while away from

> home, in order to perform services for which compensation is received, may be deducted by a professional golf player in computing his net income. * * *"

The Board has heretofore applied what we term the *Griesemer* rule to the case of an actress. In *Adrienne Ames Cabot,* B.T.A. Memo Decision, Docket No. 90996 (1939), Miss Ames, residing at Beverly Hills, California, was under contract with Paramount studios until July, 1934, when her contract terminated. During July and August of that year she worked for thirty-one days as a free lance in a picture in New York City and then for over three months in the fall in a motion picture in London, England. Upon her income tax return she deducted her plane transportation to New York City of $288, $300 for her hotel expenses in New York City and $124 for taxi services from her hotel to the studio. She also was required to entertain reporters, radio agents and others, to engage the services of maid, hairdressers, masseurs and manicurists and to pay for the cleaning of her professional wardrobe, for tips and other incidental expenses.

In 1934 she went to London to appear in a motion picture entitled "Abdul Adam". She flew from Los Angeles to New York, sailed on the Berengeria for England and remained there for three months to accomplish that purpose. She stopped at the Hotel Savoy for ten days at a cost of $500 and then rented a flat for which she paid approximately $1000 for the remainder of her stay. Her transportation expenses

were $1244.03. In addition she was required to spend considerable sums for maids, masseurs, hairdressers and manicurists' services, presents to various persons and entertainment of writers, designers and newspaper writers.

The Board held that Miss Ames had expended at least $3000 in ordinary and necessary business expenses in connection with the English engagement. In addition it allowed the deduction of her living expenses while in New York City. The Board held that living expenses and the other expenses of Miss Ames above described were business expenses, stating:

> "The allowance of deductions such as those claimed by petitioner is based upon well established principles. The expenses must be ordinary and necessary and must bear a proper relation to the taxpayer's business with reference to time, place and purpose. Reasonable expenses made by actors and others who gain their livelihood from appearances before the public for the purpose of promoting their popularity, preserving and increasing public demand for their work, and fixing their personalities in the public mind are recognized business expenses. *William Lee Tracy*, 29 B.T.A. 75; *Blackmer v. Commissioner*, 70 Fed. (2d) 255."

In the present case, the Board refused to apply the principles stated in the *Griesemer* case to the returns filed by the petitioners. In its opinion, the Tax Court makes no reference to the *Griesemer* case nor any of the other cases allowing the deductions under similar circumstances. In the case at bar, it is perfectly clear that the petitioner Ina Claire Wallace was, prior to

the year 1939, a resident of the City of New York. She came to California intending to return to New York as soon as she finished the job for which she was employed in Los Angeles. (R. pp. 124-125.) She did not intend to make her home in Los Angeles. At all times from and after March 16th, the date of her marriage, she not only intended to, but has, maintained her home in San Francisco. San Francisco has at all times since that date been the place at which she conducted all of her business except actual stage and screen appearances elsewhere. It is admitted that the expenses incurred in Los Angeles were in addition to the living expenses at her usual place of abode in San Francisco.

We submit that the facts bring the petitioners within the exact words of the Board of Tax Appeals in the *Griesemer* case wherein it stated the intent of the Congress in the following language:

> "The Congress undoubtedly intended that the taxpayer's personal expenditures in maintaining his usual place of abode should not be deducted, but that all expenditures made by the taxpayer in addition to those amounts if incurred in carrying on a trade or business should be deducted in determining net income."

It is interesting to note that the Board of Tax Appeals in the *Griesemer* case has itself said with reference to part of the language of Section 23 (a) (1):

> "We are convinced that the terms 'personal, living, or family expenses' were intended by the Congress to be applied in the ordinarily accepted sense of those words * * *."

We ask nothing more than that the term "home" be applied in "the ordinarily accepted sense" of that word.

In the *Griesemer* case the Tax Court of the United States (under its former name of Board of Tax Appeals) did construe "home" in its usual and common sense by the use of the phrase "usual place of abode" twice within the single paragraph hereinabove quoted.

There is very little distinction between "usual place of abode" and "the place where he and his family habitually reside" (*Thompson v. Warner,* supra) or "the place where he commonly resides" (*O'Hare v. Bismarck,* supra).

We respectfully submit that the *Griesemer* rule follows the congressional mandate and should be applied to the case at bar, and the claimed deductions allowed as expenses incurred while away from home on business.

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4. THE MORT L. BIXLER RULE.

In *Mort L. Bixler,* 5 B.T.A. 1181, Bixler maintained a home in Mobile, Alabama. His occupation was the managing of fairs and during 1922 he was employed at Hammond, La. Hearing that an employment opportunity existed at Houston, Texas, he went to Houston and obtained employment, after which he resigned his position at Hammond, La., and entered upon the discharge of his Houston duties. During the year in issue he made several visits to Mobile to see his family.

The Board found that Bixler was not carrying on any trade or business in Mobile, Ala., where he maintained his residence, and, in view of such finding, stated:

> "Section 214 (a) (1) authorizes a deduction only of *ordinary* and necessary expenses in carrying on any trade or business, and in this classification are included salaries paid or incurred and traveling expenses, including meals and lodging while away from home in the pursuit, or carrying on, of such trade or business. In the opinion of the Board, traveling and living expenses are deductible under the provisions of this section only while the taxpayer is away from his place of business, employment, or the post or station at which he is employed, in the prosecution, conduct, and carrying on of a trade or business. A taxpayer may not keep his place of residence at a point where he is not engaged in carrying on a trade or business, as this petitioner testified was true in this instance, and take a deduction from gross income for his living expenses while away from home. We think section 214 (a) (1) intended to allow a taxpayer a deduction of traveling expenses while away from his post of duty or place of employment on duties connected with his employment. During the taxable year this petitioner was not engaged in the carrying on or pursuit of any trade or business at Mobile. A considerable portion of the expenses claimed were incurred by the petitioner in securing employment and in going from his home to such place of employment and return, and we think amounts expended in seeking employment or returning to his domicile after the termination of such employment are not deductible under the statute,

> nor are the amounts expended in going from his place of employment to visit his family a proper deduction from gross income."

Following this decision the Board consistently held that a taxpayer may not keep his residence at a point where he is not engaged in a trade or business and take deduction for his living expenses while away from such residence or deduct traveling expenses between his *place of business* and *such residence.*

Charles E. Duncan, 17 B.T.A. 1088;
George W. Lindsay, 34 B.T.A. 840;
William Lee Tracy, 39 B.T.A. 578;
Walter M. Priddy, 43 B.T.A. 18.

George W. Lindsay was a Congressman. Citing the *Bixler* case the Tax Court held that he must reside in Washington and refused to allow deductions for expenses incurred when he returned to his home in Brooklyn to consult his constituents or his hotel expenses in Washington.

Charles E. Duncan was a traveling salesman. His only "home" was a hotel room in Buffalo where he kept his ailing wife. He apparently did no business at home. The Tax Court held that he had no "home" and, therefore, no deduction.

Walter M. Priddy had a home in Wichita Falls, Texas, and was there about 25% of the time. His principal business was at Tyler, Texas, where he spent from 30% to 40% of his time. The Tax Court held Tyler to be his home and disallowed the claimed deductions for his expenses there.

Some of the cases cited under the *Bixler* rule could as well have been determined under the rule laid down under the *Griesemer* decision with the same result. As an illustration: In the case of William Lee Tracy: Tracy determined to be an actor in 1929 and left his home in Trucksville, Pa. for that purpose. During the next few years, he visited Trucksville occasionally. The case involves the calendar year 1934, and in that year he only made one fleeting airplane visit to Trucksville. The *Tracy* case construes the word "home" in its usually accepted meaning—"the usual place of abode". Obviously Trucksville was not Mr. Tracy's usual place of abode and his expenses away from Trucksville could properly disallowed under the *Griesemer* rule.

The fact is that the *Bixler* and *Griesemer* rules cannot be co-ordinated by any known process. It seems only a matter of chance, or of the relative persuasive capacities of the respective counsel, that determines which rule is to be applied.

It might at first seem that the element of time was determinative; but in the *Griesemer* case the taxpayer was away from home three years; in the *Brown* case about half the time; in the *Powell* case three days a week; yet in all these and many other cases the Tax Court has *not* said with respect to the time away from home "he cannot have a home other than at his post or station of employment".

Does the *Bixler* rule then apply only in cases where the taxpayer does *no* business at home? The *Tracy* and *Duncan* cases would seem to support this theory,

but what about Congressman Lindsay who went home to Brooklyn to consult his constituents and Mr. Priddy who apparently did some substantial amount of business at Wichita Falls? The General Counsel for the Bureau effectively destroys this theory by permitting a golf professional to deduct his traveling expenses under the *Griesemer* rule even though he has no regular place of employment. How then does he differ from the traveling salesman in the *Duncan* case?

The *Bixler* rule is a good example of what happens when the taxing authorities disregard the mandate of Congress. Congress says "you can deduct expenses while away from home on business". Clear enough. Then the taxing authorities see that some money is escaping the Treasury. So they say "but you can't have a home except where you work and your home is where you are working". So "home" becomes a "bird of passage", a fiction carried in a lawyer's brief case, a symbol in an actress' makeup box coming to rest in the dressing room of every theatre she plays in.

The simple word "home" never had such an ephemeral meaning to a Congressman or anyone else.

If the Courts sustain the tax gatherers, then once again Congress must clear away the fiction and establish the fact.

The process is well described by Professor Maguire in his "Federal Revenue—Internal or Infernal?" (1943) 21 Tax Mag. 77,123, wherein he stated:

> "But we cannot forget that nearly every one of the (statutory changes) is a reversal of policy hitherto established in hard, prolonged, and elaborate battling between government and taxpayers, and the government on the whole won the battles, and that it won in the teeth of argument by the taxpayers which fully disclosed all of the considerations now impelling legislative retraction. Why so much official misjudgment as to the soundness of policy? Why this business not merely of marching up a hill and then marching down again, but of fighting and pleading to capture the hill, only to conclude that it was not a proper object of attack and that all the money, energy, and time expended on attack and defense were worse than wasted?"
>
> (See Footnote No. 24 to Professor Griswold's article printed in the Appendix.)

Even if it be assumed that the *Bixler* rule is sound the case of the petitioners does not fall under it for the following reasons:

1. Before 1939 the petitioner Ina Claire Wallace had a home and residence in New York and intended to return there. There is no suggestion that New York was not her "home" even in the *Bixler* sense.

2. When did she lose her New York home? She was certainly away from her New York home on business when she arrived in California.

3. She worked only two weeks in Los Angeles in January of 1939 and did not work again in Los Angeles until May 1939. Most of the intervening time she was in San Francisco. She was

in San Francisco four or five weeks before her marriage on March 16th and then established her "home", residence and place of business in San Francisco. She did not return to Los Angeles until about May 1st. Between May 1st and "a few days before September 15th" (R. p. 106) she was again in San Francisco for "a few weeks". She left Los Angeles a few days before September 15th and did not return. It would seem obvious that the petitioner Ina Claire Wallace never intended to establish a home in Los Angeles. She testified that until her marriage New York was her home and thereafter San Francisco.

4. In a previous section of this brief we have pointed out that the petitioner Ina Claire Wallace's home in San Francisco was also her "office", and that there both petitioners engaged in her business. Her home was her place of business as it is of most actors.

5. In the following section of the brief, we point out that San Francisco is the home, the office, the place of business and the post or station of employment of both of the petitioners by law as well as in fact.

We respectfully submit that for all of these reasons the *Bixler* rule can have no proper application to the cases presented on these petitions.

5. **THE EARNINGS OF BOTH PETITIONERS ARE COMMUNITY PROPERTY UNDER THE CONTROL AND MANAGEMENT OF THE HUSBAND: THE HOME, DOMICILE AND PLACE OF BUSINESS OF THE COMMUNITY WAS SAN FRANCISCO, CALIFORNIA.**

It is admitted that the earnings of both petitioners after March 16, 1939 were community property under the laws of California. (*California Civil Code,* sections 162 and 167.) Petitioners made separate returns and included upon each one-half of the community income, and each petitioner took as a deduction one-half of the community expenses. The question at issue is whether the admitted expenses of petitioner Ina Claire Wallace, while she was in Beverly Hills, were a proper deduction from the community income.

1. Under the California law, each of the petitioners have a present, equal and existing interest in the earnings of the other.

> "The respective interests of the husband and wife in community property during continuance of the marriage relation are present, existing and equal interests under the management and control of the husband * * *."
>
> *Cal. Civil Code,* Section 161 (a).

It will thus be seen that one-half of the community earnings of Mrs. Wallace belong to Mr. Wallace and likewise one-half of his earnings belonged immediately to her; likewise the business expenses of both petitioners being a charge against the community income are borne in equal proportions by each of the petitioners.

2. Earnings of petitioner Ina Claire Wallace as community income were under the control and management of her husband.

> "The husband has the management and control of the community personal property, with like absolute power of disposition, other than testamentary, as he has of his separate estate * * *."
>
> *Cal. Civil Code,* Section 172.

Simply stated, this section of the California Civil Code means that the business affairs of the community are under the control and management of the husband and that the moneys earned and expenses incurred are under his control, and he is the person primarily responsible therefor.

3. Under the California law, every person has one residence and only one, and the residence of the wife is the residence of the husband.

> "Every person has, in law, a residence. In determining the place of residence, the following rules are to be observed:
>
> 1. It is the place where one remains when not called elsewhere for labor or other special or temporary purpose, but to which he returns in seasons of repose;
>
> 2. There can only be one residence.
>
> 5. The residence of the husband is the residence of the wife.
>
> 7. The residence can be changed only by the union of act and intent."
>
> *Cal. Political Code,* Section 52.

In 9 *Cal. Juris,* at page 837, the California rule is stated as follows:

> "It is both a common law and statutory rule that the residence or domicile of the husband is the residence or domicile of the wife."

Section 156 of the *California Civil Code* provides:

> "The husband is the head of the family. He may chose any reasonable place or mode of living, and the wife must conform thereto."

The parties hereto had agreed to maintain their home in San Francisco. There is no question but that the legal residence and the actual "home" of the petitioners after March 16, 1939 was and is in San Francisco. San Francisco is the only legal residence of the petitioners under the applicable California statutes, and it is and has been the actual residence and home of the petitioners ever since that date. There is also no doubt of the fact that one-half of the petitioner Ina Claire Wallace's earned income belonged in law to the petitioner William R. Wallace, Jr., and that one-half of his earned income belonged to her. The business activities of both of the petitioners were community ventures. Her earnings and his earnings became part of the community income; her expenses and his expenses were chargeable to the community income. Petitioner Ina Claire Wallace's earnings and expenses were controlled and managed by her husband, as was all of the rest of the community property.

The whole theory of the California community property law is, in effect, that the husband and wife

are engaged in what amounts to a joint venture. Each contributes according to ability. In the present case there are two taxpayers both earning a portion of the community income. The legal residence or home of both of the taxpayers is in the City and County of San Francisco. One of the taxpayers, being a lawyer, maintains an office in that city. From time to time he travels from the city in the pursuit of his profession, and his expenses, while away from home, are properly charged against the community income. The other taxpayer, being an actress, necessarily travels from city to city in the course of her professional career. There is no doubt but that the expenses in question were incurred while the taxpayer Ina Claire Wallace was away from her usual place of abode and that on the income tax returns of both taxpayers, no deduction was made for the expenses incurred in maintaining the taxpayer's usual place of abode. There is no doubt but that the taxpayers during the period in question did maintain their place of abode in the City and County of San Francisco, and that the expenses incurred in Beverly Hills were in addition to the expenses incurred in the usual place of abode.

In the case at bar, the taxpayers had residence, home and place of business in San Francisco, and it was to their San Francisco home to which all questions relating to all business were referred. San Francisco was the "usual place of abode" of both taxpayers during the taxable year and has been ever since. The location of the usual place of abode and

of all questions relating to the community income and community expenses were under the law to be controlled and determined by the husband.

5. While we believe that the expenses incurred were a proper charge against community income and therefore deductible in equal amounts from the community income of the respective taxpayers, we see no possible justification for the disallowance of the deduction upon the return of the husband taxpayer. Certainly, so far as he was concerned, the portion of the income received by him from the earnings of his wife was received by him while she was away from home engaged in a business or profession. Certainly he had no business or place of employment outside of the City of San Francisco, and certainly he maintained no "business residence" in Beverly Hills. So far as he was concerned, the expenses incurred in Beverly Hills were beyond question in addition to his usual expenses at his usual place of abode and in the place where he maintained his office and his business. None of the cases referred to by the Commissioner touch upon this point and even if we were to assume that the rule in the *Bixler* case were to be extended to its logical conclusion and the rule of the *Griesemer* case ignored, nevertheless the expenses were, as to the husband, expenses incurred away from the legal residence, the actual home and the actual place of business.

As to the husband, there would seem to be no distinction, in connection with his one-half of the community expenses, between the out of town expenses

he incurred while trying lawsuits out of the city, and those he incurred for the account of his wife while she was out of the city making a motion picture. From the wife's viewpoint, she, like he, bore her one-half of his expenses and was allowed a deduction, but neither wife nor husband are allowed a deduction for her similar expense when she was away earning community income.

CONCLUSION.

We respectfully submit that after March 16, 1939, the home of both petitioners was San Francisco and that the expenses of the community incurred in carrying on business in the City of Beverly Hills should be allowed as a deduction upon the returns of each of the petitioners, and that the decisions of the Tax Court of the United States should be reversed.

Dated, San Francisco,
November 26, 1943.

W. R. Wallace, Jr.,
Attorney for Petitioner,
Ina Claire Wallace.

W. R. Ray,
Attorney for Petitioner,
W. R. Wallace, Jr.

Williamson & Wallace,
Of Counsel.

(Appendix Follows.)

Appendix.

Appendix

An Argument against the Doctrine that Deductions Should Be Narrowly Construed as a Matter of Legislative Grace.—In *Gould v. Gould,*[1] one of the earliest cases under the modern income tax, Mr. Justice McReynolds wrote a passage which for many years gave great encouragement to taxpayers. He there laid down the rule that:

> In the interpretation of statutes it is the established rule not to extend their provisions, beyond the clear import of the language used, or to enlarge their operations so as to embrace matters not specifically pointed out. In case of doubt they are construed most strongly against the Government, and in favor of the citizen.[2]

For many years this passage was calculated to put terror into a Government lawyer's heart. It was cited in more than two hundred reported decisions, and must have been set out in full in many thousands of taxpayers' briefs. Occasionally the courts added to it a reference to the decision of the House of Lords in *Partington v. Attorney-General,*[3] where even stronger language was used in favor of the taxpayer.

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[1] 245 U. S. 151 (1917).

[2] *Id.* at 153. For earlier expressions of the rule under prior tax laws, *see* United States v. Isham, 17 Wall. 496, 504 (U. S. 1873); United States v. Watts, 1 Bond 580, 583-84 (C. C. S. D. Ohio, 1865); United States v. Wigglesworth, 2 Story 369, 373-74 (C. C. D. Mass. 1842). Indeed, the language used in *Gould v. Gould* is very nearly a verbatim quotation from the opinion of Mr. Justice Story in the latter case.

[3] L. R. 4 H. L. 100, 122 (1869): ". . . if the Crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit

But in the course of time it came to be seen that the rule of strictly literal construction of taxing statutes in favor of taxpayers was not a sound one. In *Burnet v. Gugenheim*,[4] Mr. Justice Cordozo pointed out one of the difficulties when he refused to apply the rule of *Gould v. Gould* to the case before him, saying, "The construction that is liberal to one taxpayer may be illiberal to others". A short while later the same point was made somewhat more fully by Judge Learned Hand in his dissenting opinion in *Comm'r v. Morris*.[5] The fact that a particular construction of a taxing statute often works in favor of one taxpayer but against another seems to require that the courts should do their best to find out what the statute means in its setting as an instrument for providing revenue. And this is true even where the two-edged effect of the construction may not be present. The real objection to the rigid rule of *Gould v. Gould* was that it represented in large part the abnegation by the courts of one of their greatest and legitimate functions, the ascertainment as near as may be of the meaning of legislative acts.

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of the law the case might otherwise appear to be. In other words, if there be admissible, in any statute, what is called an equitable construction, certainly such a construction is not admissible in a taxing statute, where you can simply adhere to the words of the statute." This language was cited and quoted by Mr. Justice Sutherland in United States v. Merriam, 263 U. S. 179, 188 (1923), and in Crooks v. Harrelson, 282 U. S. 55, 61 (1930).

[4] 288 U. S. 280, 286 (1933).

[5] 90 F.(2d) 962, 964 (C. C. A. 2d, 1937). "I cannot see that the canon of interpretation which bears against the Treasury in tax statutes should influence us; it so happens that Mr. Morris will have a deficiency to pay in this case, but it is impossible to say that either interpretation will in the end favor taxpayers; sometimes they will gain, sometimes they will not."

This was clearly pointed out by Mr. Justice Stone in *White v. United States,*[6] in words which for all practical purposes have ended the influence of *Gould v. Gould*:

> We are not impressed by the argument that, as the question here decided is doubtful, all doubts should be resolved in favor of the taxpayer. It is the function and duty of courts to resolve doubts. We know of no reason why that function should be abdicated in a tax case more than in any other where the rights of suitors turn on the construction of a statute and it is our duty to decide what that construction fairly should be.

This seems an obviously sound approach to the problem of construction of taxing statutes, and we are well rid of the thought-deadening formula of the prior cases.

Meanwhile, however, another aphorism has grown up which seems directly analogous to the rule of *Gould v. Gould,* and equally unsound. This is found in the recent decision of the Supreme Court in *Interstate Transit Lines v. Comm'r,*[7] where the Court refers, as the keystone of its opinion, to "the now familiar rule that an income tax deduction is a matter of legislative grace and that the burden of clearly showing the right to be claimed deduction is on the taxpayer". This rule in its strict form is of very recent origin. Apparently the first expression in

[6]305 U. S. 281, 292 (1938). The final appearances of *Gould v. Gould* in Supreme Court opinions are found in White v. Aronson, 302 U. S. 16, 20 (1937) (per McReynolds, J.), and Hassett v. Welch, 303 U. S. 303, 314 (1938) (per Roberts, J.).

[7]11 U. S. L. Week 4490 (U. S. June 14, 1943).

terms of "legislative grace" is found in *New Colonial Ice Co. v. Helvering.*[8] There may be some reason to think that the statement there had its roots in the group of cases involving depletion in the primitive stages of our income tax laws.[9] For the most part, though, the earlier cases involving deductions seem to have gone no further than a statement of the burden of proof which generally lies on taxpayers.[10] But the sweeping rule of the *New Colonial Ice* case

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[8] 292 U. S. 435, 440 (1934). "Whether and to what extent deductions shall be allowed depends upon legislative grace; and only as there is clear provision therefor can any particular deduction be allowed." Reference may also be made to the substantially contemporaneous statement in Helvering v. Independent Life Ins. Co., 292 U. S. 371, 381 (1934). "Unquestionably Congress has power to condition, limit or deny deduction from gross income in order to arrive at the net which it chooses to tax." It should be noted, though, that this is a statement bearing on the power of Congress, and that it does not deal with a question of construing what Congress has actually chosen to do.

[9] Stratton's Independence, Ltd. v. Howbert, 231 U. S. 399 (1913); Von Baumbach v. Sargent Land Co., 242 U. S. 503 (1917); United States v. Biwabik Mining Co., 247 U. S. 116 (1918); Goldfield Consolidated Mines Co. v. Scott, 247 U. S. 126 (1918); Lynch v. Alworth-Stephens Co., 267 U. S. 364 (1925). *Cf.* United States v. Ludey, 274 U. S. 295 (1927); Burnet v. Thompson Oil & Gas Co., 283 U. S. 301 (1931). These cases have a peculiar history and would hardly seem to be a foundation for a sweeping general rule for a restrictive construction of deduction provisions. They turned on the power of Congress, not on the construction of what Congress did; and in their result they have long since been displaced by later congressional acts.

[10] *See* Burnet v. Houston, 283 U. S. 223, 227 (1931); Reinecke v. Spaulding, 280 U. S. 227, 232-33 (1930); United States v. Anderson, 269 U. S. 422, 443 (1926). Even this rule, it may be thought, has no application to the construction of statutes. The burden of proof relates to the proving of facts, and that is generally on the taxpayer. But there is no reason why there should be any burden one way or the other in the construction of a statute. In all cases the function of the court should be simply "to decide what that construction fairly should be." The question may indeed be close—otherwise it would probably not be in court—but it is none the less the function of the court to resolve it.

has since been frequently cited or quoted.[11] An indication of the potency of this approach to the construction of deduction provisions may possibly be found in the fact that the decisions in all but one of these cases went against the taxpayer.[12] Although the *New Colonial Ice* formula is a "now familiar rule", and is cited by Government lawyers in their briefs as glibly as taxpayers' lawyers once relied on *Gould v. Gould,* it has never been fully considered by the Court. Taken literally, it would mean that Congress may deny all deductions and impose a tax on gross income. This is a large question, about which there may be reasonable doubts, even today.[13] Could Congress, for example, impose the tax on the entire proceeds from the sale of property without any allowance for the cost of the property? Could it deny all deduction for wages paid? But there is no need to resolve such questions, nor to deny that Congress has very great power over the deductions which are allowed.

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[11] Helvering v. Taylor, 293 U. S. 507, 514 (1935); Helvering v. Inter-Mountain Life Ins. Co., 294 U. S. 686, 689-90 (1935); White v. United States, 305 U. S. 281, 292 (1938); Deputy v. du Pont, 308 U. S. 488, 493 (1940); Helvering v. Northwest Steel Mills, 311 U. S. 46, 49 (1940); Helvering v. Ohio Leather Co., 317 U. S. 102, 106 (1942); Interstate Transit Lines v. Comm'r, 11 U. S. L. WEEK 4490 (U. S. June 14, 1943). Curiously enough, the passage from the *New Colonial Ice* case was quoted by Mr. Justice Stone in his opinion in White v. United States, 305 U. S. 281, 292 (1938), immediately following the language from the latter case which has been set out in the text, *supra* p. 1143.

[12] The exception was Helvering v. Taylor, 293 U. S. 507, 514 (1935), where the *New Colonial Ice* case was merely cited, and the statement of the Court was confined to the burden of proof rule, the case being one turning on the proof of facts.

[13] See MAGILL, TAXABLE INCOME (1936) c. 9; Note (1936) 36 COL. L. REV. 274. *Cf.* Stewart Dry Goods Co. v. Lewis, 294 U. S. 550 (1935).

The fact remains that Congress has never sought to tax gross income. We are not dealing with a question of power, but of intention. And the whole structure and the history of the income tax makes it plain that the intention of Congress to allow deductions has been just as clear as its intention to tax income.

Is not Mr. Justice Stone's approach in the *White* case just as applicable to the matter of deductions as it is to the matter of construing taxing provisions? Is there any reason to think that Congress is allowing favors or exercising "legislative grace" when it provides for deductions? Is it not "the function and duty of courts to resolve doubts" in construing deduction provisions as well as other sections of the statute; and where the issue is one of the construction of a statute "to decide what that construction fairly should be"? A great service was done in the *White* case when it was shown that the problem of construing tax statutes was one of finding the meaning of words, and that this was a problem which must be approached free from any rules or presumptions or other barriers to the ascertainment of the thought which Congress has expressed. But no reason is perceived why exactly the same rule should not be applied to the construction of a deduction provision. The problem is to find the meaning of what Congress has said. There is no reason why that should be approached in terms of "legislative grace" or of "clear" burden on the taxpayer.

There would seem to be room to think that the approach exemplified by the passage from the *New*

Colonial Ice case has already resulted in considerable distortion of our income tax law. Much of the controversy has revolved around the matter of deductions for business expenses. The statute allows the deduction of "All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business. . . ."[14] This language has been unchanged since the Revenue Act of 1918.[15] Apparently it finds its origin in provisions which were included in the Act of August 27, 1894.[16] The legislative history of those provisions gives clear evidence that they were intended to have broad application;[17] and no action of Congress since that time has ever indicated a contrary intention. There would seem to be every reason why the words of the statute should be given a broad construction so as to achieve the obvious purpose of Congress to tax net business income. It is true that the expenses must be "ordinary

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[14]Int. Rev. Code § 23(a)(1)(A).

[15]Section 214 (a)(1) (relating to individuals); § 234(a)(1) (relating to corporation). In §§ 5(a) and 12(a) of the Revenue Act of 1916, the wording was very slightly different, but the legislative history of the 1918 Act does not show that any change of meaning was intended.

[16]28 Stat. 509 (1894). Section 28 of this Act provided in the case of individuals that "the necessary expenses actually incurred in carrying on any business, occupation or profession shall be deducted." *Id.* at 553. And § 32 imposed the tax on corporations "on the net profits or income above actual operating or business expenses." *Id.* at 556.

[17]Senator Vest of Missouri, in charge of the bill, stated that the word "business" was inserted in addition to the word "operating" expenses, "out of abundance of caution," and so that the deduction "would clearly cover all the legitimate expenses attending the business." 26 Cong. Rec. 6887 (1894). And Mr. Vest repeatedly asserted that the language of the bill was broad enough to cover various expenditures suggested by other Senators. See 26 Cong. Rec. 6888, 7131, 7133 (1894).

and necessary", but these words are given full and adequate function when they are used to separate capital expenditures from current expenses, on the one hand, and when they eliminate such things as illegal expenditures or wholly unrelated expenses,[18] on the other. But the Court, by bearing down on "ordinary and necessary", and on "trade or business", and reducing these phrases to sterile bones, has done much to thwart the purpose of Congress to impose the tax on net incomes.

In *Deputy v. Du Pont,*[19] a deduction was disallowed for an expenditure which had clearly been made by the taxpayer in connection with his business activities. The denial was based on a narrow construction of what constituted the taxpayer's "trade or business", although the court conceded that "There is no intimation in the record that the transactions . . . were entered into for any reason except a *bona fide* business purpose".[20] And then for good measure they were held not to be "ordinary and necessary" as well, in terms which would eliminate nearly all but routine expenses. It would seem, though, that the word "ordinary" in the statute was designed to eliminate expenditures which should be capitalized, and that it should take a clearer indication than that in the statute to lead to the conclusion that Congress intended

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[18]See Mr. Justice Jackson, dissenting in Interstate Transit Lines v. Comm'r, 11 U. S. L. WEEK 4490 (U. S. June 14, 1943). "Of course the Commissioner is not obliged to allow this, or any other arrangement, when it is used as a cover for tax skullduggery."

[19]308 U. S. 488 (1940).

[20]*Id.* at 493.

to disallow legitimate business expenses. And now the same approach is applied in the *Interstate Transit Lines* case[21] to disallow the deduction of an expense which was unquestionably legitimate and had the clearest business purpose. A bus company, in order to comply with state law, organized a subsidiary to conduct its operations in California. It agreed with the subsidiary to make good any deficit which the subsidiary might incur. The deduction of a payment so made was disallowed on the ground that it was not an expense of the parent's business since it was the subsidiary which carried on business in California. The dissenting opinion of Mr. Justice Jackson[22] will seem persuasive to many. Here was an undeniably legitimate expense incurred in business. Considering the obvious purpose of Congress to tax net income is there any reason to suppose that Congress intended that such a deduction be denied? Does it not seem likely that another result might have been reached if the question had been approached in terms of what the taxing statutes "fairly" mean instead of on the basis of "legislative grace" and a "clear" burden on the taxpayer?

Every reason which opposed the rule of *Gould v. Gould* seems equally applicable to the construction of deductions. In neither case should there be any presumption or any burden. In both cases the function of the Court should be to find as best it can what the

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[21]Interstate Transit Lines v. Comm'r, 11 U. S. L. WEEK 4490 (U. S. June 14, 1943).

[22]Concurred in by Mr. Chief Justice Stone and Mr. Justice Murphy.

statute "fairly" means. And in this process, there is no more reason to suppose that the meaning of a deduction provision should be narrow than that it should be unduly broad.[23] The fundamental fact is that Congress has given every indication that what it intends to tax is net income; and a construction which leads in substance to a tax on gross income is just as inconsistent with the statute as one which allows to taxpayer to receive income free from tax.

A final point may be in order. It is sometimes hard to see why the Treasury and the Department of Justice allow a case like the *Interstate Transit* case to get to the Supreme Court, or make there the argument which has now been sustained. Time and again, in the past few years, the Government has taken cases to the Supreme Court and won them, only to have to go to Congress to get the law changed in accordance with the original contentions of taxpayers.[24] Indeed,

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[23]There is ample precedent for such an approach, in addition to its clear statement in White v. United States, 305 U. S. 281, 292 (1938). In Smythe v. Fiske, 23 Wall. 374, 380 (U. S. 1874), involving a customs statute, the Court said: "A thing may be within the letter of a statute and not within its meaning, and within its meaning, though not within its letter. The intention of the lawmaker is the law." More recently, the Court has referred to a question of deduction as "purely one of statutory construction." Burnet v. Thompson Oil & Gas Co., 283 U. S. 301, 304 (1931). In Ilfeld Co. v. Hernandez, 292 U. S. 62, 66 (1934), a deduction was said to depend on a statute that "fairly may be read to authorize it."

[24]See Maguire, *Federal Revenue—Internal or Infernal?* (1943) 21 TAX MAG. 77, 123: "But we cannot forget that nearly every one of the [statutory changes] is a reversal of policy hitherto established in hard, prolonged, and elaborate battling between government and taxpayers, that the government on the whole won the battles, and that it won in the teeth of argument by the taxpayers which fully disclosed all of the considerations now impelling legislative retraction. Why so much official misjudgment

the very rule of *Deputy v. du Pont* has now been at least partially overruled by statute.[25] Should it be necessary to seek specific Congressional authorization for such a deduction as that involved in the *Interstate Transit* case?[26] Might it not have been sound administration to allow a legitimate business to deduct an expense which naturally arose in the conduct of its business? The matter of a fair allowance of deductions becomes of crucial importance with tax rates at their present level, and it is as much to the interest of the Government as it is of taxpayers to see that taxes are not imposed on what is not in any fair sense net income of the taxpayer. The whole job should not be thrown back onto the draftsmen of the statutes. Their task can be greatly simplified to the benefit of us all by a more sympathetic and organic approach to the problems of construing tax statutes.

E. N. G.

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as to the soundness of policy? Why this business not merely marching up a hill and then marching down again, but of fighting and bleeding to capture the hill, only to conclude that it was not a proper object of attack and that all the money, energy, and time expended on attack and defense were worse than wasted?''

[25]Int. Rev. Code § 23(a)(2), added by § 121 of the Revenue Act of 1942.

[26]See Mr. Justice Jackson in Helvering v. Griffiths, 63 Sup. Ct. 636, 653 (March 1, 1943). ''Why should we be asked to impose by interpretation a tax which the Treasury intends to ask Congress to lift?''